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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN JAY McCULLAR,

Defendant and Appellant.

F072249

(Super. Ct. No. CF97500167)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. James A. Kelley, Judge.

Laurie S. Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California for Plaintiff and Respondent.

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Brian Jay McCullar filed a motion to withdraw his plea 15 years after the judgment in his case was final. He asserted that he did not realize that because of the

* Before Gomes, Acting P.J., Poochigian, J. and Peña, J.

resulting conviction he would not be able to purchase a firearm, and had he known of the restriction he would not have entered into the plea agreement. The trial court denied the motion. We conclude the trial court did not abuse its discretion and affirm the order denying the motion.

FACTUAL AND PROCEDURAL SUMMARY

On July 9, 1997, a complaint was filed against McCullar charging him with felony infliction of corporal injury on a spouse in violation of Penal Code section 273.5.¹ A plea agreement was reached wherein McCullar pled to a misdemeanor violation of section 273.5, and which imposed various conditions of probation. If McCullar successfully completed probation, the agreement provided he would be allowed to withdraw his plea and enter a plea to misdemeanor battery. (§ 242.)

On April 26, 1999, McCullar withdrew his plea to the misdemeanor violation of section 273.5, and entered a new plea to misdemeanor battery. Imposition of sentence was calendared for one year later. On May 8, 2000, the charge was dismissed pursuant to section 1203.4.

On March 26, 2015, McCullar filed a petition for a writ of Error Coram Nobis seeking to withdraw his plea to the above charges on the ground that the plea was obtained in violation of his right to due process. The essence of the motion was that when McCullar attempted to purchase a firearm in 2012, he learned he was prohibited from doing so because of his conviction. McCullar asserts that had he known that his misdemeanor battery conviction would prohibit him from owning a firearm, he would not have entered into the plea agreement.

The People's opposition to the petition argued, in essence, that McCullar's dilatory conduct precluded any type of relief, he failed to satisfy the requirements for a

¹ All statutory references are to the Penal Code.

writ to issue, no relief is available for an error of law, and the firearm ban is a collateral consequence which would not entitle McCullar to any relief.

At the hearing held on June 18, 2015, the trial court denied the petition.

On August 11, 2015, McCullar filed a motion to vacate his plea. While the argument was essentially the same as for the petition, he included in his motion an assertion that defense counsel was ineffective for failing to inform him he would be prohibited from owning firearms for the rest of his life.

The district attorney did not file an opposition, but appeared at the hearing and opposed the motion. The trial court denied the motion.

McCullar's request for a certificate of probable cause alleged ineffective assistance of counsel led to his plea thus requiring relief.

DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asserting that after reviewing the record she could not identify any arguable issues. By letter dated January 13, 2016, we invited McCullar to inform us of any issues he wished us to consider. McCullar did not respond to our invitation.

We agree with appellate counsel that there are no arguable issues in this case. McCullar's attempt to seek relief from the judgment which was final 15 years ago suffers from many defects. The most obvious is that the request is untimely.

The statutory motion to withdraw a plea must be filed "at any time before judgment or within six months after the order granting probation is made." (§ 1018.) Since this time constraint has long since expired, McCullar attempted to obtain relief through a non-statutory motion to withdraw his plea.

The non-statutory motion to withdraw a plea generally requires the same showing as a motion pursuant to section 1018. "Under Penal Code section 1018, mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of the plea, but good cause must be shown by clear and convincing evidence.

[Citation.] The decision to grant the motion to withdraw the plea lies within the discretion of the trial court. [Citation.] [¶] With respect to postjudgment motions to withdraw a guilty plea, the courts have required a showing essentially identical to that required under Penal Code section 1018: ‘[W]here on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, *if a properly supported motion is seasonably made*, grant him the privilege of withdrawing his plea of guilty It should be noted, however, ... that this exceptional remedy applies ... only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes.’ [Citation.] Again the decision to grant the motion lies within the trial court’s discretion.” (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617 (*Castaneda*).)

One of the procedural rules governing a non-statutory motion to withdraw a plea requires the defendant seeking relief to establish he or she acted with reasonable diligence. (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207.) “A postjudgment motion to change a plea must be ‘seasonably made.’ [Citation.] Thus, the trial court may properly consider the defendant’s delay in making his application, and if ‘considerable time’ has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay. [Citation.] The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay.” (*Castaneda, supra*, 37 Cal.App.4th at p. 1618.)

To permit McCullar to withdraw his plea after a 15-year delay could result in a miscarriage of justice as material witnesses may have died or disappeared. Indeed, it appears to us that a delay of over 15 years in making a motion to withdraw a plea would require an extraordinary showing to entitle a defendant to relief. McCullar did not make such a showing, and the trial court did not abuse its discretion when it denied the motion.

Nor did McCullar make the required showing on the other elements of a non-statutory motion to withdraw a plea. McCullar's argument that he was not aware of the restriction on firearm purchases does not rise to duress, fraud, or other act overriding McCullar's free will when he decided to enter a plea. This is not the required strong and convincing showing of the deprivation of legal rights by extrinsic causes that would entitle McCullar to relief pursuant to this exceptional remedy.

For each of these reasons, the trial court did not abuse its discretion when it denied McCullar's motion.

DISPOSITION

The order denying the motion is affirmed.